

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of Regulatory Requirements for)	CC Docket No. 01-337
Incumbent LEC Broadband)	
Telecommunications Services)	
_____)	

**REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

I. Introduction and Summary

The United States Telecom Association (USTA,¹ through the undersigned and pursuant to Federal Communications Commission Rules 1.415 and 1.419,² hereby submits its reply comments in the above-docketed proceeding. USTA supports the common theme embodied in the filings of the incumbent local exchange carriers (ILECs) that filed in the comment round of this proceeding and that was expressly stated by BellSouth Corporation: “a broadband policy that rewards investment in facilities and allows providers to react to market conditions will help spur broadband deployment.”³ Even prior to the filing of comments in this proceeding, there was

¹ USTA is the Nation’s oldest trade organization for the local exchange carrier industry. USTA represents over 670 carrier members that provide a full array of voice, data and video services over wireline and wireless networks. USTA members support the concept of universal service, and its carrier members are leaders in the provision of advanced telecommunications services to American and international markets.

² 47 C.F.R. §§ 1.415 and 1.419.

³ BellSouth Comments (BellSouth) at 1. *See generally* Comments of The Alaska Communications Systems Affiliated Local Exchange Companies (ACS); Comments of Moultrie Independent Telephone Company (Moultrie); Comments of SBC Communications Inc. (SBC); Comments of SureWest Communications (SureWest); and Comments of Verizon (Verizon) (collectively “ILEC filers”).

ample data gathered by the FCC and non-FCC sources demonstrating the competitive nature of the broadband market. There is no lack of data to serve as a predicate for FCC deregulatory action.⁴ The FCC must simply take the leap forward and have confidence that the competitive marketplace does work. Failure on the part of the FCC to act and rectify the disparity that exists among competitors in the broadband market results in unreasonable discrimination against ILECs and raises significant Fifth Amendment issues.

As the FCC proceeds forward, it should also take a careful look at how to best reduce regulatory burdens for ILECs providing broadband services in rural, high cost markets to ensure that rural broadband investment is not inadvertently stifled.⁵ For example, nothing in the FCC's decision should preclude rural ILECs the opportunity to continue to include interstate broadband services in the NECA tariffs and pools on a permissive basis.

II. Discussion

The data that have been presented in the comment round by the ILEC filers⁶ is incontrovertible in demonstrating that the broadband market, both rural⁷ and nonrural, is competitive and that ILECs are nondominant in both the broadband mass market⁸ and the broadband larger business market.⁹ The debate here, though, is not really about the data. Data regularly amassed by the FCC on broadband and advanced services demonstrate the existence of

⁴ The FCC should take notice of the many reports it has produced and data collections it has conducted concerning broadband services provided by CLECs, cable companies, IXC's, satellite services providers, CMRS providers and fixed wireless services providers.

⁵ See Comments of the National Telecommunications Cooperative Association.

⁶ See *Broadband Fact Report*, Exhibit A, Verizon.

⁷ See ACS at 2-4 and Moultrie at 1 and 4.

⁸ DSL and cable modem services.

⁹ Medium and large businesses (including government entities). Services include ATM, Frame Relay and Gigabit Ethernet.

broadband competition, especially in the mass market.¹⁰ This competition is not limited to competition from cable companies. As the FCC pointed out in its *Annual Wireless Report* “six carriers expect to begin deploying network technologies during late 2001 and early 2002 that will allow for mobile Internet access speeds of up to 144 kbps.”¹¹ Satellite and fixed wireless service providers, while controlling a small share of the broadband mass market, are nonetheless showing dramatic growth that portends increased market penetration year-over-year.¹²

Further, large interexchange carriers such as AT&T, WorldCom and Sprint lack credibility in arguing that they are not major competitors to ILECs in the larger business market for broadband services. As pointed out by SBC, it is “one of literally dozens of companies competing in the large business broadband services market today. Its competitors include AT&T, WorldCom, and Sprint, which together, account for about two thirds of all market revenues.”¹³ Likewise, CLECs have demonstrated themselves to be formidable competitors in the larger business market. Statistics released by the FCC on February 27, 2002, show that:

Competitive local exchange carriers (CLECs) reported 17.3 million (or 9.0%) of approximately 192 million nationwide switched access lines in service at the end June 2001, compared to 14.9 million (or 7.7% of nationwide lines) at the end of the preceding year. This represents a 16% growth in CLEC market size during the first six months of 2001

About 55% of reported CLEC switched access lines served medium and large business, institutional, and government customers. By contrast, a reported 23% of incumbent local exchange carrier (ILEC) lines served such customers.¹⁴

¹⁰ See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33 (rel. Feb. 6, 2002) (*Third Report*).

¹¹ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Sixth Report (rel. July 17, 2001).

¹² See *Broadband Fact Report* at 8.

¹³ SBC at 42.

¹⁴ FCC NEWS, February 27, 2002, *Federal Communications Commission Releases Data On Local Telephone Competition*.

As is evident by the impassioned filings made by many of the parties in the comment round, this proceeding, along with several others addressing the issue of the regulation of ILEC broadband services and facilities, is of critical importance to the future of the telecommunications industry. Outcomes from this and other related broadband proceedings will also have a significant impact on the United States economy. With respect to broadband, the Nation is at a critical juncture. Regulators and legislators must decide whether they will keep the Nation on a road where telecommunication's policy stifles broadband investment by ILECs who are otherwise ready, willing and able to fulfill the promise of Section 706.¹⁵ Or, will public policy decision-makers choose a road that removes counter-productive restraints on ILEC provision of broadband, provides an incentive for broadband investment and encourages the deployment of broadband on a reasonable and timely basis to all Americans.¹⁶ The choice is simple: increased consumer choice through deregulatory parity in the broadband market or constraints on consumer choice by continuing to apply regulatory policies that are a disincentive to ILEC investment.

The State of Oklahoma recently took a step that puts Oklahoma on a path toward increased broadband investment and unrestrained broadband competition. Oklahoma passed a law prohibiting the Oklahoma Corporation Commission from imposing any regulation upon a provider of high speed Internet access service or broadband service in its provision of the service, regardless of the technology or medium used to provide the service. Oklahoma decided to end the fact-finding, and the debate, and choose broadband investment and competition by adopting a policy of regulatory parity for broadband. Oklahoma has acknowledged the consumer benefits inherent in the support of fair intermodal competition.

¹⁵ 47 U.S.C. § 706.

Unfortunately, Oklahoma could only act within the limited jurisdictional scope of its state authority. It was forced to defer to the regulatory requirements imposed by the FCC pursuant to Section 251(c) where those requirements apply to broadband facilities.¹⁷ It had to leave it to the FCC to go the rest of the way in freeing ILECs from disparate, unwarranted dominant carrier regulation in Oklahoma. This proceeding, in conjunction with the FCC's *Triennial Review Proceeding*,¹⁸ provides the FCC with the opportunity to go the rest of the way and allow broadband competition to spur a new round of investment and innovation in Oklahoma.

There being sufficient data in the record to justify a decision that follows the Oklahoma precedent, the FCC must decide whether it will evaluate competition in the broadband market based on the choices available to consumers or on the purported needs of a narrow group of intramodal competitors. USTA urges the FCC to make its decision based on the interests of consumers and not the interests of competitors who find it more convenient to leverage their entry into the broadband market on ILEC broadband investment. Regulation should only be imposed where it serves to encourage competition. It should not be used to restrain one firm in a competitive market while advantaging that firm's competitors through selectively applied regulations that restrict earnings and impose additional costs on investment.

The facts show that ILECs do not have market power in the broadband market; and therefore, they are not dominant in the broadband market. Absent a showing of market power

¹⁶ See *id.*

¹⁷ Oklahoma Statutes, Title 17, new section 139.110. (A) "The Oklahoma Corporation Commission shall not, by entering any order, adopting any rule, or otherwise taking any agency action, impose any regulation upon a provider of high speed Internet access service or broadband service in its provision of such service, regardless of technology or medium used to provide such service." (B) "An incumbent local exchange telecommunications service provider (ILEC) subject to the provisions of 47 U.S.C., Section 251(c) shall be required to provide unbundled access to network elements, including but not limited to loops, subloops, and collocation space within the facilities of the ILEC, to the extent specifically required under 47 C.F.R., Section 51.319 or any successor regulations issued by the Federal Communications Commission."

¹⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.

and dominance, there is no lawful basis on which to continue handicapping ILECs with discriminatory regulations that impede their ability to fairly compete in the broadband market. Market power can only be found to exist where the evidence in the record demonstrates that there are significant barriers to entry. That cannot be shown based on the evidence in this record when the entirety of the broadband market is examined. A market power analysis that solely focuses on the relative positions in the broadband market of a limited set of intramodal competitors such as ILECs and CLECs is legally deficient. Competition and market power have to be viewed from the perspective of the consumer and the choices available to consumers throughout the relevant product and geographic markets.¹⁹ This requires consideration of all broadband service providers, both intermodal and intramodal, and precludes limiting the analysis to a comparison of the relative market positions of a less than complete set of competitors that bears no relationship to the way that consumers view the market.

Despite the good intentions of regulators, regulation can itself be a barrier to entry. “It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation”²⁰ The FCC has the opportunity to take a complete view of the broadband market, a view the looks at the market as consumer see it and not as a limited set of ILEC competitors see it. The result of that review should be the removal of entry barriers for ILEC broadband investment that are a direct result of existing FCC regulations. When the FCC looks at the entire broadband market, the only conclusions that can fairly be reached, based on the data filed in this docket, are that: the broadband market is competitive; ILECs do not have market power in the broadband market; and ILECs are not dominant in the broadband market.

96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) (*Triennial Review Proceeding*).

¹⁹ In the matter at hand, the outcome of the analysis is unaffected by whether the relevant geographic market is national or the service area of the ILEC.

Accordingly, the FCC should proceed forward and adopt a national deregulatory policy that removes the disincentives to broadband investment that exist as a result of the current regulations that are applied to ILEC broadband services and facilities.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: /s/Lawrence E. Sarjeant
Lawrence E. Sarjeant

Vice President – Law and General Counsel

1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300

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²⁰ *U.S. v. Syufy Enterprises*, 903 F.2d 659 at 673 (9th Cir. 1990).

